Supreme Court, U.S.
FILED

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NO. _____ .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner

v.

FIRST INTERSTATE SERVICES COMPANY,
WEBB EDWARDS, WILLIAM MURIN,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Shong-Ching Tong
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Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether new evidence and new fact (Employees' Telephone Directory, 12/88) precluded the barring of petitioner's claims on the basis of Collateral Estoppel?

2. Whether the physicians' statements supported petitioner's claims and precluded the barring of petitioner's claims on the basis of Collateral Estoppel?

3. Whether the petitioner really meant "Dismissal without prejudice", and mistakenly marked "Dismissal with prejudice" ?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shong-Ching Tong prays that a Writ of Certiorari be issued to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on August 25, 1994.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are the parties shown in the caption of this case, Shong-Ching Tong, First Interstate Services Company, Webb Edwards, and William Murin.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit effectively affirmed the judgment of the trial court in an unpublished Memorandum (Appendix A).

The United States Court of Appeals for the Ninth Circuit denied a Petition for Rehearing on October 19, 1994 (Appendix B).

The trial court's original order granting Respondents' motion for summary

judgment was based on the ground that petitioner's claims were barred by the Doctrines of Res Judicata and Collateral Estoppel.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the Petition for Rehearing on October 19, 1994. Petitioner invokes this certiorari jurisdiction under 28 U. S. C. Section 1257 (3). Petitioner argued below that the trial court's order granting respondents' motion for summary judgment was erroneous because it did not consider the facts that without recalling petitioner, there were new employees hired after Petitioner was laid off; that the Equal Employment Opportunity Commission (EEOC) was investigating petitioner's complaints; and that Petitioner was serious ill when Petitioner inadvertently dismissed a previous state action with prejudice.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U. S. C. Section 2000e-5

Relevant portions of 42 U.S.C. Section 2000e-5 are set forth in Appendix C.

STATEMENT OF THE CASE

This is a petition for certiorari requesting review of a Memorandum of the United States Court of Appeals for the Ninth Circuit filed on August 25, 1994 (Appendix A), affirming the trial court's judgment dismissing Petitioner's claims after granting respondents' motion for summary judgment.

On September 13, 1988, petitioner filed a state action against First Interstate Services Company and others in the Superior Court of the State of California, County of Los Angeles, Case No. C698462.

On January 10, 1989, petitioner filed an "First Amended Complaint" after defendants in case no. C698462 demurred to the complaint

(Appellant's Excerpts of Record (AER), page 119).

On January 24, 1989, while petitioner was seriously ill and the EEOC investigation was pending, petitioner dismissed the state action by inadvertently marking a "With Prejudice" box on a Request for Dismissal Form (AER, page 110).

On June 15, 1992, petitioner filed a civil complaint for 1) Discrimination and Unlawful Employment Practice, 2) Tortious Termination, 3) Job Harassment, 4) Negligent Employment, and 5) Breach of the Implied Covenant of Good Faith and Fair Dealing after the EEOC completed its investigation of charges filed by petitioner in 1988 and after petitioner was given the "First Interstate Services Company Employees' Telephone Directory, 12/1988". This Telephone Directory shows that there were new hires after petitioner was laid off.

On July 29, 1992, First Interstate Bancorp filed its Answer to the complaint alleging it was erroneously sued as First Interstate Services Company.

On March 15, 1993, during the hearing re "Order to show cause Re Dismissal of the pendent claims", the trial court granted Respondents' request to file a "Motion for Summary Judgment", which was calendared for hearing on April 6, 1993.

On May 11, 1993, the trial court granted respondents' "Motion for Summary Judgment" on grounds that petitioner's action was barred by res judicata and that the trial court had no jurisdiction over the Workers' Compensation matters.

Because the trial court's order granting respondents' motion for summary judgment and the Memorandum of the United States Court of Appeals for the Ninth Circuit did not consider physicians' statements that petitioner had

been ill from May, 1988 to March, 1989 or the new hires shown on the "Employees Telephone Directory, 12/88" (AER, Exhibit A7), Petitioner now seeks relief from the United States Supreme Court.

GROUND FOR INVOKING THE JURISDICTION OF THIS COURT

(i) Dated of Entry of the judgment or decree sought to be reviewed:

August 25, 1994.

(ii) Date of any order respecting a re-hearing, and the date and terms of any order granting an extension of time within which to file the petition for a Writ of Certiorari:

October 19, 1994.

(iii) Express reliance upon United States Supreme Court Rule 12.3 when a Cross-Petition for a Writ of Certiorari is filed under that Rule and the date of receipt of the petittion for a writ of certiorari in connection with which the cross-petition is filed:

Not applicable.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari:

Title 28 United States Code, Section 1257.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. Section 2000e-5.

REVIEW OF JUDGMENT OF A STATE COURT

Not applicable.

REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS

Please see above and Appendix A.

REASONS FOR ISSUING THE WRIT:

1. NEW EVIDENCE AND NEW FACT (EMPLOYEES' TELEPHONE DIRECTORY, 12/88) DO NOT BAR PETITIONER'S CLAIMS AND THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT APPLICABLE IN THE INSTANT CASE

In "AER", Exhibit A7 - Employees' Telephone Directory, 8/88 & 12/88 - indicates that there were new employees hired after petitioner was laid off by respondents.

When petitioner was laid off, he was informed that the employer was undergoing a Reduction in Force. Petitioner believes that

such was a pretext; that he was actually being terminated in retaliation for filings of Workers' Compensation claims and EEOC charges. Thus, petitioner's claims were not barred by Collateral Estoppel (Wells v. Marina City Properties, Inc. (1981) 29 CA3d 781, 176 Cal.Rptr. 104).

2. THE PHYSICIANS' STATEMENTS SUPPORTED PETITIONER'S CLAIMS AND PRECLUDED THE BARRING OF PETITIONER'S CLAIMS ON THE BASIS OF COLLATERAL ESTOPPEL

In "AER", Exhibits A1, A2, A3, A4, and A5 (A1 - Letters from Truck Insurance Exchange to petitioner, 4/12/88, to Workers' Compensation Appeals Board, 9/22/88 and 12/30/88: A2 - letters from Nogales Family Counseling, Inc. to petitioner's attorney, 11/22/88, 11/30/88, 1/13/89; A3 - Dr. Edmund Chien's Report; A4 - Dr. David Y. Hwang's Report,; A5 - Dr. Stewart Shanfield's Certification of Permanent Disability Letter re Acupuncture Treatments) can show that petitioner was

seriously ill from May, 1988 to March, 1989. All of these documents supported petitioner's arguments that the erroneous marking of the "with prejudice" box on a Request for Dismissal Form was really due to serious illness and not meant to get rid of the claims.

3. PETITIONER REALLY MEANT "DISMISSAL WITHOUT PREJUDICE", AND MISTAKENLY MARKED "DISMISSAL WITH PREJUDICE"

In order for this Court to consider the issue whether petitioner's intent at the time of marking the box "With prejudice" was done inadvertently, petitioner hereby incorporates portions of the Reporter's Transcript re the hearing held on April 6, 1994:

- - - - -

Page 187, lines 9 thru 15:

The Court: Were you representing the defendants in the state court?

Ms. Johnson: No, Your Honor.

The Court: Do you know whether there was discussions at that time about the completion of the EEOC investigation ?

Ms. Johnson: No, Your Honor. . . .

Page 188, lines 6 thru 25:

The Court: All right. The problem is he is pro per. He probably didn't mean to dismiss it with prejudice, I am sure he didn't. And the EEOC investigation was going. He may have lost his lawsuit here. But I don't think there is much question that he didn't intend to forever get rid of his lawsuit.

For the defendants to come in now and be able to take advantage of that is a little bit disheartening, but perhaps you might have a right to under the law.

Ms. Johnson: Yes. Your Honor. Mr. Tong is no babe in the woods as far as litigation goes. He has filed litigation on his own behalf as well as has had attorneys represent-

ing him.

The Court: Tell me why anybody would dismiss that action with prejudice.

Ms. Johnson: I don't know, Your Honor. I can't read his mind.

The Court: Well, read your mind, his mind, anybody's mind. Why would you dismiss it with prejudice?

Ms. Johnson: Presumably he decided he didn't

Page 189, lines 1 thru 25:

want to proceed with it.

The Court: You don't really believe that, do you?

Ms. Johnson: Your Honor, I don't know.

The Court: Did he continue to proceed with his claims? He continued to pursue the EEOC. He continued all of these claims. So to say well, he wanted to be through with the lawsuit, why would he pursue the EEOC claim?

Ms. Johnson: He may well have relied on the - - we are speculating here, Your Honor, because there is no competent evidence.

The Court: We are speculating but we know that it was inadvertence. The question is - - at least I know it was inadvertence.

Ms. Johnson: Well, Your Honor, I respect what the court has to say, but the EEOC, of course, if they had found any sort of discrimination could have initiated an action on Mr. Tong's behalf.

The Court: And what would you have contended?

Ms. Johnson: The EEOC would have been able to proceed.

The Court: You wouldn't have contended it was collaterally estopped?

Ms. Johnson: No, because it would be a different party.

Page 190, lines 1 thru 15:

The Court: A defferent party, but

standing in the shoes of Mr. Tong. I am quite confident you would be in there claiming that they were collaterally estopped from doing so.

Ms. Johnson: Well, Your Honor, we are where we are on this case.

The Court: I know where we are.

Ms. Johnson: And the fact that under state law the dismissal with prejudice is an adjudication with merit should be sufficient to grant the motion. The Roybal case which we cited discussed the fact of a potential error and it was nevertheless found binding.

The Court: Anything additional?

Mr. Tong: No.

The Court: I will give you an order on it.

- - - - -

Since the trial court knew that the inadvertently marking of the box "With

prejudice" was not petitioner's true intent, the trial court should not granted respondents' motion for summary judgment.

As stated earlier, the complaint in the state's action was filed on September 13, 1989. The First Amended Complaint was filed on January 10, 1989 after respondents demurred to the Complaint.

Because the trial court did not follow its own rule giving petitioner 24 days to develop and present facts in preparation of the opposition to respondents' motion for summary judgment, the complaint in the state action could not be included for comparison.

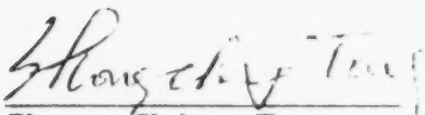
Moreover, if petitioner was <u>not</u> ill seriously and the EEOC's investigation was <u>not</u> pending, then, there was no reason for petitioner to file the "First Amended complaint" on January 10, 1989 and dismissed the state action on Juanary 24, 1989, about 14 days later.

CONCLUSION

In light of the foregoing facts and evidence, this case is appropriate for review by this Court. It involves significant issues that have never been squarely addressed by this Court. A decision by this Court is also necessary to establish uniformity on issues raised in the instant case. It is respectful ly requested that this Court will issue its Petition for Certiorari.

DATED: January 17, 1994

Respectfully submitted,



Shong-Ching Tong,
Petitioner Pro Se

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHONG-CHING TONG,	)	No. 93-55910
	)	
Plaintiff - Appellant,	)	D.C. No. CV 92-03577-WMB
	)	Central District
vs.	)	of California
	)	
FIRST INTERSTATE SERVICES COMPANY, WEBB EDWARDS, WILLIAM MURIN,	)	MEMORANDUM*
	)	FILED
Defendants - Appellees.	)	August 25, 1994
	)	CATHY A. PETERSON, CLERK U.S. COURT OF APPEALS

Appeal from the United States District Court for the Central District of California William Matthew Byrne, Jr. District Judge, Presiding

Submitted June 29, 1994**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App. P. 34(a), Ninth Circuit Rule 34-4.

BEFORE: CHOY, SKOPIL, and FERGUSON,
Circuit Judges.

Shong-Ching Tong appeals pro se the district court's dismissal on summary judgment for First Interstate Services Company and two individuals (collectively "First Interstate") in his employment discrimination action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. Sections 2000e to 2000e-17, the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sections 621-634, and California state law. Tong alleged that First Interstate Discriminated against him on the basis of his race and age, and retaliated against him for filing complaints with the Equal Employment Opportunity Commission and for applying for Workers' Compensation. He also asserted numerous California state law claims. We affirm.

This court reviews de novo both a district court's dismissal on summary

judgment and interpretation of state law. Trujillo v. County of Santa Clara, 775 F.2d 1359, 1363, 1367 (9th Cir. 1985). Although the district court also granted partial summary judgment on the ground of the statute of limitation and for lack of jurisdiction, this court may affirm on any ground fairly supported by the record, see Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990), even if the district court relied on erroneous ground, see Lowe v. City of Monrovia, 775 F.2d 998, 1007 (9th Cir. 1985), as amended, 784 F.2d 1407 (1986).

Title 28 U.S.C. Section 1738 "provides that the 'judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or

usage in the courts of such State . . . from which they are taken.'" Trujillo, 775 F.2d at 1363 (quoting 28 U.S.C. Section 1738).

Under California law, "res judicata precludes a plaintiff from litigating a claim if: the claim relates to the same 'primary right' as a claim in a proper action, the prior judgment was final and on the merits, and the plaintiff was a party . . . in the prior action." Id. at 1366. Similarly, "a party will be (collaterally) estopped from relitigating an issue if: the issue raised in the present action is identical to that decided previously, the prior judgment was final and on the merits, and the person against whom estoppel is asserted was a party to the prior action." Id. at 1369.

In both California and federal courts, a voluntary dismissal with prejudice has the effect of a final judgment on the merits.

Roybal v. University Ford, 255 Cal.Rptr. 469, 472 (Ct. App. 1989); Beard v. Sheet Metal Workers Union, Local 150, 908 F.2d 474, 477 n.3 (9th Cir. 1990). Because "Title VII claims are within the exclusive jurisdiction of the federal courts," such claims cannot be precluded by res judicata based upon prior state proceedings. Trujillo, 775 F.2d at 1366. Prior state proceedings can have, however, collateral estoppel effects on Title VII claims. Id. at 1369.

Here, Tong does not dispute that: (1) the same "primary right" - - the right to be free from employment discrimination based upon race, age, medical condition, and retaliation for filing EEOC claims - - formed the basis for both his prior state and the instant federal actions (or that the issues raised in the current action were identical to those previously decided); (2) the prior state judgment was final on the merits; and (3) he

was a party in the prior action. Instead, Tong argues that volunatry dismissal of his state court action resulted from clerical error because an illness prevented him from checking the status of the case and the EEOC investigation was still pending. This argument lacks merit.

Even assuming that Tong mistakenly allowed his state court action to be dismissed, the time period for requesting relief from the judgment expired over three years before he filed his federal action. See Cal.Civ.Proc. Code Section 473 (West Supp. 1994) (6-month limitation for seeking relief from dismissal order); see also Roybal, 225 Cal.Rptr. at 472 & n.4 (same). Because the state court judgment was a final judgmenton the merits, Tong's state law claims are barred by res judicata, and collateral estoppel bars him from pursuing previously raised issues under Title VII. See Trujillo, 775 F.2d at 1370.

For these reasons. the district properly dismissed Tong's action.

Tong contends that the district court's decision to shorten the time for First Interstate to file its summary judgment motion denied him a full and fair opportunity to oppose the motion. This contention is without merit.

Fed.R.Civ.P. 56(c) requires a motion for summary judgment to "be served at least 10 days before the time fixed for the hearing." When service is made by mail, 3 days are added to the prescribed period. Fed.R.Civ.P. 6(e). Under the Local Rules for the Central District of California, however, a motion served upon a party by mail must be served no later than 24 days before the hearing date. C.D. Cal. Local R. 7.4. The district has discretion to shorten the time period. Id. Opposition papers must be served at least 14 days before the hearing date. C.D. Cal. Local R. 7.6.

Here, the district court initially scheduled a pretrial conference for March 29, 1993, and set the trial date for April 13, 1993. On March 15, however, the district court scheduled a hearing on April 6, 1993 for First Interstate's summary judgment motion, ordered First Interstate to file its moving papers by March 19, 1993, allowed Tong 10 days to file his opposition, and rescheduled the trial date for April 27, 1993.

Because the hearing on the summary judgment motion was only 21 days before the trial date, it appears that the court did not abuse its discretion by ordering First Interstate to file its motion 17 days before the hearing, rather than 24. Despite the fact that First Interstate was given only 4 days to file a summary judgment motion, Tong still was given the required 10 days to file his opposition. Therefore, Tong's complaints

regarding a "full and fair opportunity" are baseless.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHONG-CHING TONG.	No. 93-55910
Plaintiff - Appellant.	DC# CV 92-03577 -WMB
vs.	O R D E R
FIRST INTERSTATE SERVICES COMPANY, WEBB EDWARDS, WILLIAM MURIN,	
	FILED
Defendants - Appellees.	October 19, 1994

CATHY A. PETERSON, CLERK
U.S. COURT OF APPEALS

Before: CHOY, SKOPIL, and FERGUSON, Circuit Judges.

The petition for rehearing is DENIED.

U.S.C. Section 2000e-5 (f)(1) . . .

If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section, . . ., the Commission, . . ., shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

U.S.C. Section 2000e-5 (f)

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. . . .

U.S.C. Section 2000e-5 (j)

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.